DEVELOPMENT & COMMERCIAL BANK BHD.

v.

LAM CHUAN CO. & ANOR.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 23-536-86]
24 SEPTEMBER 1988

CIVIL PROCEDURE: *Execution - Writ of seizure and sale issued against judgment debtor - Objection by person/occupier of premises - Occupier claims he is owner of goods seized - Whether goods seized belong to claimant and bona fide purchaser - Goods purchased by claimant from judgment-debtor as listed in inventory - At the time of judgment premises occupied by judgment-debtor - At the time of attachment occupied by claimant - Whether setting up of claimant is to defraud execution creditor in getting fruits of litigation.*

CIVIL PROCEDURE: *Appeal - Claimant appeals against decision of Senior Assistant Registrar - Whether purchase by claimant bona fide - Senior Assistant Registrar held no bona fide purchase - Whether appellate Court can differ from finding of fact by trial Court.*

EVIDENCE: *Burden of Proof - Claimant in possession of goods at the time of seizure - Judgment creditor to prove judgment debtor was actual lawful owner of goods attached - If goods seized were in possession of judgment debtor - Claimant to proof goods seized belong to him - Circumstances in which this can differ.*

CIVIL PROCEDURE: *Stay of execution - Judgment creditor given leave to appeal to Supreme Court - Stay granted as regards release of goods attached - Pending disposal of appeal to Supreme Court - To maintain status quo - Irreparable injury might result to judgment-creditor if stay refused - Condition set by granting stay would compensate claimant if appeal dismissed.*

This was an appeal against the decision of the Senior Assistant Registrar, High Court, Ipoh who had dismissed the claimant's claim for the property attached by the plaintiff in execution of judgment obtained in default of appearance against the defendant on 14 January 1987 for RM429,202.76 sen with interest and costs. The goods were attached at the instance of the plaintiff - judgment creditor at No. 76, Jalan Sultan Iskander, Ipoh on 27 January 1988 which at the time of the attachment was occupied by the claimant but which at the time of the judgment was occupied by the defendant/judgment debtor.

Held:

[1] The Court was of the view that it was actually for the execution creditor to prove that the judgment debtor were the actual lawful owner of the goods attached but which they had failed to do.

[2] The Court's view was that based on the evidence taken before the Senior Assistant Registrar, the affidavits averred and authorities cited, the claimant had in fact and in law succeeded in establishing that they were the actual lawful owners of the attached property seized on the premises.

[3] The Court was satisfied that the claimant had been lawfully incorporated and was clearly a separate legal entity from the defendant on 14 April 1987, that it had been the tenant on the said premises and that the goods attached on premises were the claimants. The claimant's appeal was allowed against the decision of the Senior Assistant Registrar with costs.

[Appeal allowed with costs.]

[Editor's Note: Judgment-creditor's appeal to the Supreme Court *vide* Civil Appeal No. 408/88 was dismissed on 9 January 1989 with costs.]

(Coram: Amar Lee Hun Hoe CJ (Borneo), Mohamed Yusuf Mohamed SCJ and Ajaib Singh SCJ)

Cases referred to:
Sigma Air Conditioning Sdn. Bhd. v. World Wide Agencies [M] Sdn. Bhd. [1980] 1 MLJ 179
Salomon v. Salomon & Co. Ltd. [1895] 9 All ER 34
Chin Sim Neo v. Sit Hoon Neoh [1889] 4 Ky 492
Woon Ngee Yew & Ors. Ng Yoon Thai & Ors. [1941] MLJ 37
Low Teck Cheng v. Leong Wah; Lim Kay Poh (3rd Party) [1964] 30 MLJ 372
Overseas Investment Private Limited v. Anthony William O' Brien & Anor. [1988] 2 CLJ (Rep) 82
Max Hilckes & Anor. v. Lee Choon Guan [1912] Malayan Cases 17
The Motor Emporium v. Arumugan [1933] 2 MLJ 276
Re Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. [No. 2] [1976] 1 MLJ 131
Ajaib Singh v. Jefferey Fernandez [1971] 1 MLJ 139

Other source referred to:
Mallal's Supreme Court Practice, Tan Sri Chang Ming Tat, p. 173

For the plaintiff/judgment creditor - Lim Seong Chun; M/s. Lim Seong Chun & Co.
For the claimant - S.A. Lingam; M/s. S.A. Lingam & Co.

JUDGMENT

Abdul Malek Ahmad J:

This is an appeal by the claimant against the decision of the learned Senior Assistant Registrar on 14 May 1988 dismissing their claim for the property attached by the plaintiff in execution of judgment obtained in default of appearance against the defendant on 14 January 1987 for RM429,202.76 sen with interest and costs. The property had been attached at No. 76, Jalan Sultan Iskandar, Ipoh (the premises) on 27 January 1988 which at the time of the attachment was occupied by the claimant but which at the time of the judgment was occupied by the defendant.

It is pertinent to note that this was in fact the second attachment on the premises, the first being on 21 August 1987 but this was abandoned after discussions between the parties. It is also relevant to take into account that the claimant had in fact been incorporated on 14 April 1987 with a RM50,000 issued and paid up capital and RM300,000 authorised share capital.

According to the managing director of the claimant (who had worked for the defendant for 16 years before it was wound up on 16 April 1987) in his affidavit dated 29 January 1988 (encl. 11), by a sale agreement dated 13 April 1987 (LW3) he and four others had purchased from the defendant chattels (RM3,000) and cloth materials (RM47,000) amounting to RM50,000 which purchase was for the purpose of contribution of their respective capital in the claimant which was incorporated the following day.

This was formalised by letter dated 2 June 1987 (LW4) when they transferred the said chattels and cloth materials to the claimant in consideration of 50,000 shares of RM1 each. Since then, the claimant had purchased from 28 suppliers more cloth materials totalling approximately RM459,735.49 sen (LW5). As from 1 May 1987, the claimant became the tenant of the said premises at RM1,900 a month (rental receipt - LW6) as evidenced by the tenancy agreement

commencing on 1 June 1987 between the claimant and Tan Soo Choo dated 28 June 1987 (LW7). All these facts were later supplemented by another affidavit from the same deponent (encl. 22) which, apart from stating the same details, exhibited the remainder of the rental receipts and the names of the 28 suppliers from whom the cloth materials had been purchased.

The hearing before the learned Senior Assistant Registrar took a number of days with the claimant having called not less than 15 witnesses, 12 of whom testified that it was the claimant who had bought the said goods attached from them on different dates, the details of which were amply supported by invoices, account books, delivery orders and other documents. However, all these were rejected by the learned Senior Assistant Registrar who held that there were only two issues to be decided:

(a) Whether the claimant had purchased the goods as listed in the inventory from the judgment debtor at the time of the first intended attachment; and

(b) Whether the purchase was done *bona fide*, if the answer to the first issue is positive.

In the consequence, he relied on *Sigma Air Conditioning Sdn. Bhd. v. World Wide Agencies [M] Sdn. Bhd.* [1980] 1 MLJ 179, and was of the view that there was no *bona fide* purchase in the circumstances.

I am aware that this appeal is by way of rehearing but at this injuncture there would be no oral evidence of witnesses and the appeal Court is dependant on the notes of evidence taken before the Senior Assistant Registrar. On a question of fact, I should not, in the normal nature of things, question the decision of the presiding officer who had seen and heard the witnesses who appeared before him as he would be at an added advantage in being able to observe their demeanour at the time of giving their testimony.

Before me, Counsel for both the execution creditor and claimant chose not to submit orally but relied on their somewhat lengthy written submissions and affidavits. I had had the opportunity over the 3-week period of adjournment to painstakingly peruse through these, all the relevant accounts and other documents and also the notes of evidence before the learned Senior Assistant Registrar and came to the conclusion that the only real issue is whether the goods belonged to the claimant or the defendant and judgment debtor at the time of the attachment.

To my mind, it is not disputed that the claimant had been incorporated on 14 April 1987. What is being objected to by the plaintiff and execution creditor is that the directors and shareholders of the claimant are related or connected to the managing partner of the defendant. One of them is undeniably the daughter-in-law whereas another is supposed to be the brother-in-law whilst yet another brother-in-law had given up his shares at an earlier date. Yet another was one of the staff of the defendant for a long period of time to the extent, as alleged, that his loyalty to the defendant cannot be questioned. Further, it has been pointed out that the managing partner's son is the manager of the claimant. In the process, the Court is urged to infer that the setting up of the claimant is actually to defraud the execution creditor in getting the fruits of their litigation against the defendant and judgment debtor with the relatives and former employee of the managing partner of the defendant acting as his puppets. The allegation is further secured by the fact that the trade names of the defendant and the claimant are so close in pronunciation to actually amount to the same name in the Chinese language despite the difference in spelling in English.

But, then, what about the 12 witnesses who had testified that they had supplied said the goods to the claimant and not the defendant after the incorporation of the claimant and before the attachment? Can all 12 of them be said to be participating in this fraudulent attempt by the defendant and claimant to deprive the plaintiff of his judgment against the defendant as well? Logic and common sense would urge any reasonable mind to conclude that, with so many witnesses from different parts of the country as well as Singapore most of whom have yet to be paid their balance amounts of the transactions, coupled with the production of all the accounts which run over a period of time, this certainly cannot be the case.

Sigma's case (1) has to be distinguished and cannot apply here. There, the judgment debtor was in actual possession of the attached goods at the time of attachment and the claimant had purchased the goods for and on behalf of a partnership firm who should have been the claimant. Apparently, that partnership firm was registered 16 days after the attachment and that the only 2 partners of the partnership firm were the director of the judgment debtor and the claimant in that case. In the event, the Court had held that the purchase about 2 weeks before the attachment was not *bona fide*. Another distinguishing feature was that there was only one purchase there compared to several in this case and none of the directors or shareholders in the defendant were involved in the claimant.

The only other point to consider is the submission by learned Counsel for the plaintiff that the goods attached had not been properly identified to be the goods supplied by the textile suppliers who gave evidence. It is has to be accepted that the defendant had in fact wound up on 16 April 1987 and did not operate on the said premises since then. They had in fact sold off the remaining chattels and cloth materials to the claimant and whatever goods attached cannot in any case belong to the defendant. The execution can only continue if the execution creditor is able to prove to the Court that the goods belonged to the defendant. This they have not done and instead it is the claimant, who is running the business on the premises in which the goods are attached, who had brought the evidence, to the satisfaction of the Court I might add, as to where the supplies came from. It must be emphasised that on the nature of dealing with textiles some of the goods purchased before the attachment would have been sold off and identification of each and every roll of material would not be an easy process. But on the face of the claimant being in possession of the premises and the goods which are in it at the time of the attachment, the testimony from the suppliers only cements the fact that the goods attached actually belong to the claimant.

The case of *Salomon v. Salomon & Co. Ltd.* [1895] 9 All Rep 34, also demolishes the plaintiff and execution creditor's contention that despite the incorporation of the claimant the managing partner of the defendant is actually the person running it through his relatives and former employee. That case was actually the landmark decision illustrating the reasoning process leading to the conclusion of a separate legal personality. There Salomon held 20,001 shares whereas his wife and 5 children held 1 share each in the limited company incorporated in 1892 run by Salomon who held absolute power. He had for 30 years prior to the incorporation ran the same business which he had sold to the company. In October 1893, an order was made for the winding-up of the company at which date the company was indebted to unsecured creditors other than Salomon to the amount of L7,773. An action was brought by the liquidator of the company against Salomon and the trial Court declared that the company were entitled to be indemnified by the appellant for that amount. This was affirmed by the Court of Appeal. However, the House of the Lords was of the view that the said limited company was perfectly lawful as a valid legal entity and it was absolutely separate and apart from Salomon himself.

Lord Macnaghten had made the observation that the company is at law a different person altogether from the subscribers to the memorandum and though it may be after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Lord Herschell in that case had said

> I am at a loss to understand what is meant by saying that A. Salomon & Co. Ltd. is but an alias of A. Salomon. It is not another name for the same person, the company is exhypothensi a distinct legal persona.

Lord Halsbury, Lord Chancellor, had also decidedly declared

> I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable A. Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

In our present case, the managing partner of the defendant was not even a director or shareholder of the claimant and he cannot therefore be held to be in control of the claimant at all.

As to the point of disagreeing with the decision of the presiding officer who saw and heard the witnesses, I rely on *Chin Sim Neow v. Sit Hoon Neoh* [1889] 4 Ky 492, (although appeals in matters of detail, as accounts, should not be encouraged, yet where the evidence preponderated in favour of the appellant, the Court of Appeal would act on such evidence, and even reverse the judgment of the Court below); *Woon Ngee Yew & Ors. v. Ng Yoon Thai & Ors.* [1941] MLJ 37 (an appellate Court should be very loath to differ on a finding of fact by a trial Court but if the trial Judge can be shown to have misdirected himself on the evidence or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference, it may then be the duty of the appellate Court to interfere) and *Low Teck Cheng v. Leong Wah; Lim Kay Poh (3rd Party)* [1964] 30 MLJ 372 (in the circumstances, having regard to the language used by the trial Judge, an appellate Court was entitled to form its own conclusion as to the facts of the case.)

On the issue of the substance of the claimant's claim, it had been held in *Overseas Investment Private Limited v. Anthony William O'Brien & Anor*. [1988] 2 CLJ (Rep) 82 that where a wife is in possession of chattels in a matrimonial house and she gives sworn testimony that they are hers, an execution creditor cannot be held to have displaced her claim by producing evidence that the husband was living in the same house and is in receipt of a good income. In *Max Hilckes & Anor. v. Lee Choon Guan* [1912] Malayan Cases 17, it was decided that the claimant who bought the shares from the defendant before the actual transfer, which shares were in the name of the defendant and which were seized by the plaintiff, should succeed in his claim, despite the fact that the printed transfers were blank without the name of the transferee and that they had not actually been signed by the defendant.

In *Mallal's Supreme Court Practice* by Tan Sri Chang Ming Tat at p. 173 it is stated that in a sheriff's interpleader the claimant is as general rule made the plaintiff and the burden of proof rests upon him where the goods seized were at the time of seizure in possession of the judgment debtor, possession being *prima facie* evidence of title. If, however, the claimant was in possession at the seizure the burden of proof may be upon the execution creditor

thus reversing the ordinary rule and the execution creditor may be made plaintiff. I was of the opinion that it is actually for the execution creditor here to prove that the judgment debtor were the actual lawful owners of the goods attached but which they had failed to do. In any case, it was my view that based on the evidence taken before the Senior Assistant Registrar, the affidavits averred and authorities cited, the claimant had in fact and in law succeeded in establishing that they were the actual lawful owners of the attached property seized on the premises.

In the circumstances, I was satisfied that the claimant had been lawfully incorporated and was clearly a separate legal entity from the defendant on 14 April 1987, that it had been the tenant on the said premises from 1 May 1987 at RM1,900 rental per month and that the goods attached on the premises were theirs. As such, I allowed the appeal against the Senior Assistant Registrar's decision with costs.

However, having given the plaintiff leave to appeal, I allowed the stay as regards the release of the goods attached to the claimant to maintain the *status quo* of the parties pending the disposal of the appeal to the Supreme Court in view of the fact that should the appeal succeed, the plaintiff might not be able to obtain the fruits of this litigation whereas being a bank, it was in a position to secure the payment of all costs expenses incurred by the claimant together with damages to be sustained by the stay up to the date of disposal of the Supreme Court appeal should that appeal fail. I was of the view that irreparable injury might result to the plaintiff if the stay was refused and the condition set by granting the stay would compensate the claimant if the plaintiff's appeal was dismissed subsequently. I also advised the parties to prepare the records for the appeal expeditiously to cut down expenses.

Also found at [1989] 1 CLJ 192